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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY JETSON, Defendant and Appellant.	B292229 (Los Angeles County Super. Ct. No. KA106873)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed in part, reversed in part, and remanded with directions.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Jose Reyes Suazo, a known gang member, attempted to shoot Timothy Jetson in the head not long after a drug deal went south. The gun jammed, and Jetson escaped unharmed. For the next two days Suazo taunted Jetson with threatening text messages. Jetson bought a gun and began carrying it with him for protection. Two days after Suazo attempted to kill Jetson, Suazo drove to a motel where Jetson had been living, looking for Jetson. Jetson saw Suazo before Suazo saw Jetson. Jetson ran up to Suazo while he was still sitting in his car and shot him three times, killing him.

Jetson pleaded no contest to possession of a firearm by a felon, and a jury convicted him of voluntary manslaughter. The trial court sentenced Jetson to a prison term of 23 years four months and imposed various fines and fees. Jetson appealed, challenging his conviction and sentence on numerous grounds.

We affirm the conviction because substantial evidence supported the verdict and none of Jetson's evidentiary or procedural arguments has merit. We reverse his sentence and remand for a limited trial and for resentencing, however, because Jetson's admission of a prior serious felony conviction was not knowing and voluntary. We also strike a one-year prior prison term enhancement under Penal Code section 667.5, subdivision (b), and remand for the trial court to allow Jetson to request a hearing and present evidence on his ability to pay the fines and fees the trial court imposed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Suazo Attempts To Kill Jetson*

Jetson met Suazo in June 2014 when Jetson bought a television from Suazo, who installed the television in Jetson's motel room. Jetson and Suazo developed a business relationship in which Jetson sold Suazo and his uncle Richard Baxter crack cocaine, and Suazo's stepfather worked on Jetson's two cars. The relationship was "friendly at first," but Jetson thought Suazo and Baxter believed Jetson "owed them something," including more money for the television.

Suazo and Baxter told Jetson they were members of criminal street gangs and had committed multiple violent crimes. Suazo bragged to Jetson he was a member of the East Side Bolen gang and served 10 years in prison for murder and extortion. Suazo also told Jetson he stabbed a neighbor and arranged to have a cousin killed for being a "snitch" while Suazo was on trial. Jetson read two newspaper articles Suazo showed him about the incident that stated Suazo "asked for permission" from the Mexican Mafia to have his cousin killed. Jetson also saw Suazo punch the owner or manager of the motel where Jetson lived in the face, after which Jetson was asked to leave the motel.

Baxter told Jetson he was in the Mexican Mafia and recently had been released from prison after serving 19 years of a life term. Jetson believed members of the Mexican Mafia would kill anyone who crossed them. Jetson overheard Suazo and Baxter talk about having guns, and they told Jetson they "put in work all the time," meaning they committed acts of violence for the benefit of their gangs.

On July 25, 2014 Jetson and his girlfriend went to Suazo's house to deliver drugs to Suazo and Baxter. Baxter met Jetson in the driveway, and after giving him the drugs Jetson asked Baxter to pay him. Baxter said he would pay Jetson when he wanted and went into the house with Suazo. In hindsight, Jetson said Baxter apparently took Jetson's request for payment as a sign of disrespect. Jetson's girlfriend said she needed to use the restroom and went into the house. When she came out, she told Jetson all of the lights in the house were off, and Suazo and Baxter were peeking out the windows. Jetson said he was about to leave when Baxter came outside and said, "'Man, we're gonna pay you the money, man.'" Jetson responded, "'Man, you all can keep the money.'" Baxter said, "'People can die for that.'"

The next day Suazo sent Jetson a text message stating: "What the fuck happened last night? My uncle said you guys disrespected him and that's why he told you to leave. . . ." Later that day Suazo sent Jetson another text message stating he was in Pomona and had Jetson's money. Jetson picked up a friend before going to meet Suazo because he was nervous. Jetson and his friend met Suazo and Baxter in a parking lot. Suazo and Baxter got out of Suazo's car, and Suazo walked up to Jetson while he was still seated in his car. Suazo put a gun to Jetson's head, and said, "This is [what you get] when you disrespect my family. . . . You want to play?" Jetson tried to bat the gun away and put his car into gear while his friend got down on the floorboard. Suazo tried to shoot Jetson, but his gun jammed, and Jetson was able to drive away. Suazo fired shots at the back of Jetson's car as he drove away.

Jetson hid the car at a friend's house, but he did not call the police. "If I called the police," he said, "they will label me as a

snitch and more people would have been trying to kill me." The day after the shooting, July 27, 2014, Suazo sent a text message to Jetson telling him he was lucky the gun jammed. "You now see I'm good at this game when you play with my fam[ily]. So you want to keep playing. You see yourself. God had to be on your side. Ha ha ha for now."

B. *Jetson Kills Suazo*

After Suazo tried to kill Jetson, Jetson bought a gun on the street for $40 for protection and moved to a different motel. When Suazo continued to send text messages to Jetson, Jetson replied, "I just wanted to talk to you cause this is all about my money. You don't want to pay me?" Jetson also sent a message stating, "I'm scared. I just want to talk to you. I don't want no problems." Jetson continued to deliver drugs to customers at his previous motel despite hearing that Suazo and Baxter were looking for him there.

On July 29, 2014 at 2:00 p.m. Jetson delivered drugs to a customer at his former motel and then walked across the street to a restaurant next to a liquor store. After crossing the street Jetson saw two cars approaching the motel, one of which he recognized as Suazo's. Jetson thought someone must have called Suazo to tell him Jetson was at the motel, and he was scared. Jetson ran behind the liquor store and saw Baxter get out of one of the cars and walk toward the motel. Jetson thought Baxter was going to the motel to find him and kill him. Suazo remained in his car on the street looking toward the motel. Jetson slowly approached the street from the parking lot behind the liquor store when someone Jetson knew rode by on a bicycle. Jetson did not acknowledge the cyclist because he did not want to give away

his position, but according to Jetson the motion caused Suazo to turn his head and see Jetson. Jetson testified that he and Suazo made eye contact and that he saw Suazo reach for something he believed was a gun. Jetson ran up to within a few feet of Suazo's car, pulled his gun from his pocket, and shot Suazo three times, killing him.

Jetson saw Baxter coming across the street, and he ran back the way he had come, around the far corner of the building, and across the street. Eventually Jetson found someone to give him a ride to his new motel.

Baxter got into Suazo's car and drove it to Suazo's house with Suazo's body in the car. He did not call 911 or seek medical attention for Suazo, but Suazo's girlfriend called 911 when Baxter arrived at the house.

Jetson later returned to the restaurant where he had parked his car and drove to the home of a friend where he spent the night. Along the way he threw his gun out the window. Jetson said he did not call the police because he was afraid there were still people "looking for [him]."

C. *The Police Arrest Jetson, and the People Charge Him with Murder*

Two days after the shooting police officers arrested Jetson at his friend's house. Two detectives interviewed Jetson at the police station. Jetson initially denied he knew about the shooting, but ultimately told the detectives he shot Suazo because he believed Suazo was going to kill him. Jetson also told the detectives Suazo was looking at the motel when Jetson ran up to Suazo's car and shot him.

The People charged Jetson with murder (Pen. Code, § 187, subd. (a), count 1)[1] and possession of a firearm by a felon (§ 29800, subd. (a)(1), count 2). The People alleged Jetson committed both offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b). The People also alleged Jetson personally used a firearm within the meaning of section 12022.53, subdivision (b), personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d). The People also alleged that Jetson had a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12) and a prior conviction for a serious felony within the meaning of section 667, subdivision (a)(1), and that he had served four prior prison terms within the meaning of section 667.5, subdivision (b).

D. *A Jury Convicts Jetson of Voluntary Manslaughter, and the Trial Court Sentences Him*

Prior to trial the People moved to strike the gang allegation under section 186.22, and Jetson entered a plea of no contest to count 2 (possession of a firearm by a felon) and admitted certain prior convictions. The jury acquitted Jetson of first and second degree murder and told the court it was deadlocked on the lesser included offense of manslaughter. After further deliberations the

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[1] Undesignated statutory references are to the Penal Code.

jury found Jetson guilty of voluntary manslaughter and found true the lesser included firearm allegation under section 12022.5.

Jetson admitted he had a prior serious or violent felony conviction within the meaning of the three strikes law. Jetson made a motion to strike the five-year enhancement under section 667, subdivision (a)(1), which the trial court denied. On the conviction for voluntary manslaughter, the trial court sentenced Jetson to the middle term of six years, doubled under the three strikes law, plus four years for the firearm enhancement, five years for the prior serious felony conviction under section 667, subdivision (a)(1), and one year for a prior prison term under section 667.5 subdivision (b).[2] On the conviction for possession of a firearm by a felon, the court sentenced Jetson to a consecutive term of 16 months (one-third the middle term of two years, doubled under the three strikes law), which gave Jetson a total prison term of 23 years four months. The trial court also imposed $140 in assessments, a parole revocation fine of $300, and a $300 restitution fine. Jetson timely appealed.

DISCUSSION

A. *Substantial Evidence Supported Jetson's Conviction for Voluntary Manslaughter*

In connection with the murder charge the trial court instructed the jury on the lesser included offense of voluntary manslaughter based on imperfect self-defense. Jetson argues uncontroverted evidence demonstrated that, because Suazo presented an "imminent threat of violence" to Jetson, it was objectively reasonable for Jetson to shoot Suazo in self-defense.

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[2] The record does not indicate why the trial court imposed only one enhancement under section 667.5, subdivision (b).

Jetson's argument turns on the definition of "imminent" and the jury's interpretation of the circumstances confronting Jetson on July 29, 2014.

1. *Applicable Law and Standard of Review*

"'Self-defense, when based on a *reasonable* belief that killing is necessary to avert an imminent threat of death or great bodily injury, is a complete justification, and such a killing is not a crime.'" (*People v. Beck and Cruz* (2019) 8 Cal.5th 548, 648; see *People v. Elmore* (2014) 59 Cal.4th 121, 133-134.) "'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.'" (*People v. Manriquez* (2005) 37 Cal.4th 547, 581; see *People v. Wang* (2020) 46 Cal.App.5th 1055, 1070.) """[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future."""" (*Manriquez*, at p. 581; see *In re Christian S.* (1994) 7 Cal.4th 768, 783.)

"""Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter."" [Citation.] Imperfect self-defense 'obviates malice because that most culpable of mental states "cannot coexist" with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand.' [Citation.] 'This doctrine is a "'narrow'" one and "will apply only when the defendant has an actual belief in the need for self-defense and only when the defendant fears immediate harm that ""must be instantly dealt

with.""""" (*People v. Beck and Cruz*, *supra*, 8 Cal.5th at p. 648, italics omitted; see *People v. Landry* (2016) 2 Cal.5th 52, 97-98.)

"To assess whether a belief was objectively reasonable, 'a jury must consider what "would appear to be necessary to a reasonable person in a similar situation and with similar knowledge."'" (*People v. Brady* (2018) 22 Cal.App.5th 1008, 1014; see *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.) The jury "must assume '"the point of view of a reasonable person in the position of defendant,"' taking into account '"all the elements in the case which might be expected to operate on his mind."'" (*Brady*, at p. 1014; see *Humphrey*, at p. 1083.) The jury, however, need not adopt "the standpoint of a reasonable person 'with [his] background of trauma, abuse, mental illness, and physical limitations.' 'The issue is not whether defendant, or a person like him, had reasonable grounds for believing he was in danger.' [Citation.] It is instead 'whether a person of ordinary and normal mental and physical capacity would have believed he was in imminent danger of bodily injury under the known circumstances.'" (*Brady*, at pp. 1014-1015; see *Humphrey*, at p. 1088 ["in assessing reasonableness, the question is whether a reasonable person in the defendant's circumstances would have perceived a threat of imminent injury or death, and not whether killing the [victim] was reasonable in the sense of being an understandable response to [the victim's behavior under the circumstances"].) The force used in response must also be ""'reasonable under the circumstances.'" (*Brady*, at p. 1014; see *People v. Minifie* (1996) 13 Cal.4th 1055, 1065.)

"'"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is

reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Beck and Cruz*, *supra*, 8 Cal.5th at p. 626; see *People v. Edwards* (2013) 57 Cal.4th 658, 715.)

2. *A Rational Jury Could Have Found Jetson Unreasonably Believed He Was in Imminent Danger*

The People did not dispute that Suazo was a dangerous gang member who tried to kill Jetson just days before Jetson killed him. The People also did not dispute that Suazo and Baxter went to Jetson's former motel looking to kill Jetson, nor did they dispute Jetson's testimony that he actually believed he was in danger of future harm. The questions for the jury, therefore, were whether Jetson subjectively believed he was in imminent harm and, if so, whether that belief was objectively reasonable. (See *People v. Brady*, *supra*, 22 Cal.App.5th at p. 1014 [to justify self-defense, the defendant's belief that bodily injury is about to be inflicted on him must both subjectively exist and be objectively reasonable].) By acquitting Jetson of murder, the jury found Jetson subjectively believed he was in danger of imminent harm, but by convicting him of voluntary manslaughter, the jury found that belief objectively unreasonable. Substantial evidence supported that finding.

Jetson testified Suazo turned to look at him and reached for a gun as Jetson approached Suazo's car. Counsel for Jetson

argued that "at that point it was either kill or be killed." If credible, Jetson's testimony would support a finding Suazo was preparing to shoot Jetson, which in turn would support an inference Jetson reasonably believed he was in imminent danger of death or serious injury.

To counter Jetson's testimony the People introduced forensic evidence and Jetson's prior inconsistent statements to the police. The forensic evidence showed that the three shots Jetson fired struck Suazo in his right cheek, his right ear, and his upper left chest, with the bullets' trajectories all downward. The presence of stippling caused by gunpowder particles, combined with the absence of soot on Suazo's skin, indicated Jetson shot Suazo from a distance of one to two feet. Although the autopsy could not determine the order of the shots Jetson fired or whether Suazo was moving when Jetson shot him, the forensic evidence supported the People's theory that Suazo was sitting in his car looking straight ahead or toward the motel when Jetson shot him from close range and that, contrary to Jetson's testimony, Suazo was not looking at Jetson from approximately six feet away.[3] The People also introduced Jetson's statement to the police that Suazo was "watching the motel" and not looking at Jetson when Jetson shot him. And the People argued Jetson's testimony that he could only see Suazo above his mid-abdomen contradicted Jetson's testimony that he was able to see Suazo reach for a gun inside the car, casting further doubt on Jetson's version of events.

Viewing this evidence in the light most favorable to the judgment, the jury reasonably could conclude Jetson actually, but unreasonably, believed he was in imminent danger of death or great bodily injury. In particular, Jetson's statement to the police

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[3] Jetson also testified that he did not see the gun in Suazo's car until he "got closer," possibly after the first shot.

that Suazo had not yet seen Jetson when Jetson shot him supported a finding that the circumstances did not require Jetson to kill Suazo "'to avert an imminent threat of death or great bodily injury.'" (*People v. Beck and Cruz*, *supra*, 8 Cal.5th at p. 648.) Jetson's statement to the police also cast doubt on Jetson's testimony that he saw Suazo reach for a gun before Jetson shot him. Of course, the jury could have credited Jetson's testimony and concluded he was in imminent danger of death or great bodily harm when he shot Suazo. And the jury could have interpreted the forensic evidence to support Jetson's theory that Suazo was looking at him when Jetson first shot him but turned away before Jetson shot him in the right cheek and ear. But the evidence did not compel that result, and we must defer to the jury's resolution of this conflict in the evidence and presume the existence of every fact the jury could reasonably deduce from the evidence. (*Id.* at p. 626; see *People v. Rivera* (2019) 7 Cal.5th 306, 331 ["'If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.'"]; *People v. Gomez* (2018) 6 Cal.5th 243, 281 ["'[r]esolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact'"]; *People v. Salazar* (2016) 63 Cal.4th 214, 242 [""'An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.'""].)

Jetson argues he was in imminent danger when Suazo appeared at his former motel, thinking Jetson was there. Jetson argues "it was objectively reasonable for [him] to shoot Suazo in self-defense because Suazo and Baxter were there to kill him, as evidenced by Suazo's texts [to Jetson] that he was 'going to take action.'" Jetson cites *People v. Collins* (1961) 189 Cal.App.2d 575 for the proposition that a homicide is justifiable self-defense

where the accused "had a reasonable belief the deceased was about to commit a felony."

Collins is readily distinguishable. In that case the defendant struck and killed the victim after the victim attacked the defendant and threatened to sexually assault him. (*People v. Collins*, *supra*, 189 Cal.App.2d at pp. 589-590.) The victim "'threw [the defendant] on [a] bed, and pulled his pants almost off. He had a 'scissors grip' around [the] defendant's waist with his legs. . . . [The defendant] grabbed a wine bottle off the night stand and struck [the victim] until the latter 'let go.' When [the victim] relaxed his legs from around defendant, defendant 'ceased to strike him.' When [the victim] 'quit struggling,' [the] defendant 'got up off the bed,' pulled up his pants, got his jacket off a chair, and 'immediately left the room.'" (*Id.* at pp. 589-590.) The court concluded the peril facing the defendant was "swift and imminent and the necessity for action immediate." (*Id.* at p. 589.)

The peril facing Jetson was not similarly imminent, nor was the necessity for action immediate. Suazo did not know where Jetson was as Suazo sat in his car looking toward the motel or straight ahead. While Suazo very well may have intended to kill Jetson that day, Suazo had not yet taken any action to fulfill that intent when Jetson shot him.

The circumstances facing Jetson were more similar to those facing the defendant in *People v. Brady*, *supra*, 22 Cal.App.5th 1008, where the jury found the defendant did not act in self-defense. In *Brady* the defendant, a street vendor, stabbed a customer after the customer demanded his money back and verbally threatened the defendant with his "kazoo" or knife. (*Id.* at p. 1011.) The defendant believed the customer was a gang member who carried a knife for protection. During the altercation, the defendant "touched or lightly pushed [the victim] on the chest several times while [the victim] fidgeted with his

own wallet. As [the victim] turned his gaze away from [the defendant] and looked off into the distance, [the defendant] suddenly grabbed the collar of his sweatshirt with one hand and thrust a knife into his lower abdomen with the other." (*Ibid.*) The defendant testified he feared for his life, but the jury convicted him of assault with a deadly weapon. The court in *Brady* held substantial evidence supported the jury's finding that the defendant's actions were not objectively reasonable because the victim "did not advance towards [the defendant], otherwise act in a physically threatening manner, or appear to reach for [a weapon]." (*Id.* at p. 1018.) Thus, the court determined, "the jury could have concluded that any threat to [the defendant] was not sufficiently imminent or that the amount of force he used in response was unreasonable." (*Ibid.*) As did the jury in *Brady*, the jury here credited evidence that Suazo never advanced on Jetson or reached for a weapon, which supported the jury's finding that Jetson's belief he was in imminent danger was objectively unreasonable.[4]

B. *The Trial Court Did Not Abuse Its Discretion or Deny Jetson Due Process in Denying His Request for a Continuance*

Jetson argues the trial court abused its discretion and violated his right to due process by denying a motion for a two-week trial continuance to locate Baxter, who failed to appear at trial. There was no abuse of discretion or constitutional violation here.

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[4] Because we conclude substantial evidence supported the jury's verdict of voluntary manslaughter, Jetson's argument we must reverse his conviction on count 2 because a felon may lawfully possess a firearm for self-defense fails.

1. *Relevant Proceedings*

On Thursday, March 1, 2018, the date set for trial after numerous continuances, the trial court held a hearing on a motion for continuance Jetson filed on February 28, 2018. Jetson requested a continuance to March 22, 2018 to allow him to locate Baxter, who had complied with a subpoena and agreed to be "on call." Counsel for Jetson explained she had just discovered after returning from vacation that her office had lost contact with Baxter and that the investigator assigned to the case had taken an emergency leave of absence. In support of the motion counsel for Jetson said Baxter was a material witness because he drove Suazo's body to Suazo's house after the shooting, could corroborate that Suazo was "looking to kill" Jetson when Suazo went to the motel the day of the shooting, and would testify there was a gun in Suazo's car.

The People opposed the motion, arguing that Baxter was unlikely to appear and testify he and Suazo went to the motel to kill Jetson and that Baxter was not a credible witness. The People also argued counsel for Jetson had not shown diligence in her attempts to find Baxter and secure his attendance at trial, including by failing to subpoena him for the new trial date. The People observed that counsel for Jetson would have over a week to continue looking for Baxter before the People rested their case and Jetson could call him in his case.

The trial court denied the request for a two-week continuance, stating that it had been 1,306 days since Jetson first appeared and that the court on September 30, 2015 had ruled there would be no further continuances. Since that ruling, the court had set 10 trial dates, and Jetson had requested nine continuances, each for a different reason. The court nevertheless

granted a shorter continuance, to March 5, 2018, to give Jetson and his attorney the opportunity to "do everything that is possible" to be ready for trial. Counsel for Jetson stated for the record that, in addition to getting Baxter's agreement to be on call, defense investigators had gone to Baxter's parole agent and his last four known addresses and contacted his friends and family in an effort to find him.

On March 5, 2018 Jetson renewed his request for a continuance in a new department to which the case had been transferred. Counsel for Jetson said that her investigator tried without success to find Baxter over the intervening weekend and that Baxter was "the most important witness for us at this point." Counsel for Jetson said her office advised her that she would need at least two investigators to go to Baxter's last three known addresses and that she needed more time to get a new investigator "up to speed." The court again denied the request for a continuance, but observed that, because the parties would have to go through the process of selecting a jury and there were several intervening days when court would not be in session, the defense would likely have up to two weeks before the end of the People's case to find Baxter. In the event the defense could not locate him within that time period, the court said it did not "think it will happen."

2. *Applicable Law*

"A criminal trial may be continued only upon a showing of good cause. Trial courts have wide discretion to determine whether such cause exists." (*People v. Reed* (2018) 4 Cal.5th 989, 1004; see § 1050, subd. (e).) "In making that determination, courts consider whether the moving party has acted diligently,

the anticipated benefits of the continuance, the burden that the continuance would impose on witnesses, jurors, and the court, and whether a continuance will accomplish or hinder substantial justice." (*Reed*, at p. 1004; see *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 509 [to show good cause for a continuance, the defendant must "show he exercised due diligence in securing the witness's presence, that the expected testimony was material, noncumulative, and could be secured within a reasonable period of time, and that the facts to which the witness was expected to testify could not otherwise be proven"].)

"We review a trial court's denial of a continuance request for abuse of discretion." (*People v. Mora and Rangel*, *supra*, 5 Cal.5th at p. 508.) "Absent a showing of an abuse of discretion and prejudice, [a] trial court's denial does not warrant reversal." (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) To determine whether a trial court's order denying a continuance was so arbitrary that it denied the defendant due process, the reviewing court considers the circumstances of each case and the reasons given for the request. (*Ibid*.; accord, *People v. Reed*, *supra*, 4 Cal.5th at p. 1004.) "[T]he trial court may not exercise its discretion 'so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.'" (*Doolin*, at p. 450; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 650; see *People v. Alexander* (2010) 49 Cal.4th 846, 934 ["'only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel'"].)

Jetson urges us to apply the standard in *Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, which held "there is usually good cause for a continuance" when "a witness was served with a

subpoena but fails to appear as commanded." (*Id.* at p. 271.) Whether the defendant has served a subpoena on a witness who failed to appear for trial is relevant to whether the defendant exercised due diligence in securing that witness's testimony. *Jensen*, however, concerned section 1382, which governs whether good cause exists for the People's request to continue a trial date beyond the statutory time period. (*Jensen*, at p. 271; see § 1382, subd. (a).) Therefore, we consider whether the trial court erred in granting a shorter continuance than Jetson requested under the standard of review applicable to section 1050, not section 1382.

3. *Jetson Failed To Show Baxter's Testimony Could Be Secured in a Reasonable Period of Time*

Assuming without deciding that Jetson exercised reasonable diligence in securing Baxter's presence at trial and that Baxter's expected testimony was material and noncumulative, Jetson still failed to show he could secure Baxter's testimony in a reasonable period of time. As a result, the requested continuance would not have been "useful." (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1118-1119 [continuance would not have been "'useful'" where "there was little to indicate that the issue [underlying the request] would be resolved in the near future"].) By the time Jetson began presenting his case on March 16, 2018, more than two weeks had passed since his initial request for a continuance on February 28, 2018. And nothing in the record indicates Jetson was any closer to locating Baxter on March 16, 2018 than he was on February 28, 2018. His investigators had already tried to find Baxter at four prior known addresses, contacted his parole agent, and reached out to Baxter's

friends and family. Indeed, Jetson concedes (albeit in connection with a different argument) that Baxter had absconded from parole and that his parole agent was "unable to keep tabs on Baxter." When Jetson renewed his request for a continuance on March 5, 2018, he did not offer any information suggesting his efforts to locate and serve Baxter would be fruitful in the near future. Thus, Jetson failed to meet his burden of showing additional continuances would do him or his case any good. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1004 [trial court did not abuse its discretion in denying a continuance where "there was no adequate showing the evidence, even if material, could be obtained within a reasonable time," and the "lengthy delays and prior continuances permit serious doubt whether the additional time requested would have yielded meaningful evidence"]; *People v. Williams* (1959) 168 Cal.App.2d 624, 627 ["In the absence of an affirmative showing as to [a witness's] whereabouts and that his testimony could have been obtained within a reasonable time, it was not an abuse of discretion to deny a continuance."]; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1038 [trial court "was within its discretion in refusing to grant a continuance, because defendant had not demonstrated that a continuance would be useful in producing specific relevant mitigating evidence within a reasonable time"].)

The trial court's denial of Jetson's requested continuance also did not violate Jetson's right to due process. The trial court gave Jetson a continuance to attempt to locate Baxter, and Jetson still had not located Baxter in the two weeks he ultimately had to find Baxter before putting on his defense. The trial court did not deprive Jetson or his attorney of a reasonable opportunity to prepare for trial. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 450;

see *People v. Woodruff* (2018) 5 Cal.5th 697, 723, fn. 3 ["Because we find no error, we necessarily also find no constitutional violation."].)

C. *The Trial Court Did Not Prejudicially Err or Violate Jetson's Constitutional Rights in Its Evidentiary Rulings*

1. *The Trial Court Did Not Err in Admitting Evidence of Jetson's Prior Convictions, and Any Error Was Harmless*

Jetson argues the trial court erred and violated his right to due process by admitting evidence of his 1999 and 2006 convictions for possession of drugs for sale under Health & Safety Code section 11351.5 and his 1996 conviction for assault with a firearm under section 245, subdivision (a)(2). The trial court did not abuse its discretion in admitting any of Jetson's prior convictions, and any error in admitting his 1996 conviction for assault with a firearm was harmless.

a. *Relevant Proceedings*

Prior to trial the court ruled Jetson could introduce evidence of Suazo's prior violent crimes under Evidence Code section 1103, subdivision (a), to show Suazo had a propensity for violence. In response, the People sought to introduce evidence of Jetson's prior conviction for assault with a firearm under Evidence Code section 1103, subdivision (b), which allows "evidence of the defendant's character for violence or trait of character for violence . . . if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with

the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant . . . ."

Counsel for Jetson argued that, because Jetson's 1996 conviction for assault with a firearm was too remote and involved conduct too similar to the charges in this case, the undue prejudice of that evidence substantially outweighed its probative value under Evidence Code section 352. Counsel for Jetson stated that, "in 22 years, [Jetson] hasn't had any crimes of violence." The trial court acknowledged that a single violent crime committed more than 20 years ago with "nothing in between" would be inadmissible. But the court stated that, "if an individual continues to live a life where he has been repeatedly arrested for different things, and he's involved in the drug culture, . . . it's important for jurors to have that information." The trial court ruled Jetson's prior conviction was admissible under Evidence Code section 352.

Counsel for Jetson asked whether the court would also allow evidence of Jetson's drug offenses from 1999 and 2006, arguing they were also too remote. The trial court observed that each of the drug offenses occurred shortly after Jetson was released from prison on a prior offense, "so it's not like there are vast periods from 1996 to the present where there hasn't been any involvement [in crime]." Excluding that evidence, the court said, would give Jetson's testimony a "false aura of veracity." The court ruled Jetson's prior drug convictions were admissible for impeachment.

Finally, counsel for Jetson asked the court to "sanitize" Jetson's prior convictions by allowing the People to refer to his

prior felonies without identifying the underlying offenses. Regarding Jetson's prior conviction for assault with a firearm, the People argued evidence of the conviction was more probative than prejudicial precisely because "this is a case similarly situated to the assault with a firearm conviction." Counsel for Jetson argued the similarity with the charged offense would allow the People to argue that "because he did it then, he's now guilty today of the crime [for] which he's charged." Regarding Jetson's prior drug offenses, the People argued that, because the jury would already hear evidence that Jetson was involved in narcotics sales, evidence of his prior convictions for possession for sale was not unduly prejudicial. The trial court denied Jetson's request to sanitize his prior convictions, concluding they were not "so highly inflammatory" that the jury would decide Jetson's guilt based on the prior convictions rather than Jetson's motivation and intent when he shot Suazo.

At trial Jetson testified that he grew up in a violent neighborhood and was shot in the head in 1989 as a result of "mistaken identity," leaving him blind in one eye. Jetson said the events leading to his 1996 conviction occurred when someone armed with a knife hit Jetson in his "good eye," and Jetson shot that person in self-defense. Jetson testified that he pleaded guilty to assault with a firearm as part of a plea deal.

b. *Applicable Law*

Under Evidence Code section 1103, subdivision (a)(1), the defendant in a criminal action may "offer evidence of the victim's 'character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct)' in order 'to prove conduct of the victim in conformity

with the character or trait of character.'" (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 695.) "Once the defendant has offered such evidence, the prosecution is permitted to offer its own character evidence of the victim to rebut the defendant's evidence. [Citation.] Further, if the defendant has offered 'evidence that the victim had a character for violence or a trait of character tending to show violence,' the prosecution is permitted to offer 'evidence of the *defendant's* character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct)' in order 'to prove conduct of the defendant in conformity with the character or trait of character.' [Citation.] In other words, if . . . a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that (1) the victim was not a violent person and (2) the defendant was a violent person, from which the jury might infer it was the defendant who acted violently." (*Id.* at pp. 695-696.)

Under the California Constitution and Evidence Code section 788, the parties may use certain prior convictions for impeachment. (See Cal. Const., art. I, § 28, subd. (f)(4) ["Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."]; Evid. Code, § 788 ["For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony," except in circumstances not relevant here].) Prior felony convictions

admissible under article I, section 28, subdivision (f) of the California Constitution and Evidence Code section 788 must be crimes of moral turpitude, "'even if the immoral trait is one other than dishonesty.'" (*People v. Hinton* (2006) 37 Cal.4th 839, 888; see *People v. Clair* (1992) 2 Cal.4th 629, 654; *People v. Carkhum-Murphy* (2019) 41 Cal.App.5th 289, 294.) Assault with a firearm and felony possession of drugs for sale are crimes of moral turpitude that counsel may use to impeach witnesses. (See *Hinton*, at p. 888 [assault with a deadly weapon]; *In re Rogers* (2019) 7 Cal.5th 817, 847 [possession of drugs for sale]; *People v. Castro* (1985) 38 Cal.3d 301, 317 [same].)

Jetson does not argue his prior convictions were inadmissible under Evidence Code section 1103 or 788. Instead, he argues their admission was unduly prejudicial under Evidence Code section 352, which gives the trial court discretion to exclude evidence of prior convictions where "the probative value of a defendant's prior acts [are] substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Davis* (2009) 46 Cal.4th 539, 602.) "Because evidence of other crimes may be highly inflammatory, the admission of such evidence ""must not contravene other policies limiting admission, such as those contained in Evidence Code section 352."""" (*Davis*, at p. 602; see *People v. Anderson* (2018) 5 Cal.5th 372, 407 ["a witness may be impeached with any prior felony conviction involving moral turpitude, subject to the trial court's discretion under Evidence Code section 352 to exclude it if it finds its prejudicial effect substantially outweighs its probative value"]; *People v. Castro*, *supra*, 38 Cal.3d at p. 306 [neither the California Constitution nor Evidence Code section 788

"abrogate[s] the traditional and inherent power of the trial court to control the admission of evidence by the exercise of discretion to exclude marginally relevant but prejudicial matter" under Evidence Code section 352].) Evidence Code section 352 applies to evidence admissible under Evidence Code section 1101 (*Davis*, at p. 602) and Evidence Code section 1103, subdivision (b) (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 700).

A trial court has broad discretion in determining whether to admit prior convictions under Evidence Code section 352. (*People v. Edwards* (2013) 57 Cal.4th 658, 722; *People v. Carkhum-Murphy*, *supra*, 41 Cal.App.5th at p. 295.) In exercising its discretion, the trial court "must consider whether the prior conviction reflects adversely on the witness's honesty or veracity, its nearness or remoteness in time, its similarity to the present offense, and the potential effect on the defendant's failure to testify." (*Carkhum-Murphy*, at p. 295; see *People v. Davis*, *supra*, 46 Cal.4th at p. 602].) Evidence Code section 352 also gives a trial court discretion to "sanitize" prior convictions to avoid undue prejudice. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 178.)

We review a trial court's ruling on the exclusion of evidence under Evidence Code section 352 for an abuse of discretion. (*People v. Davis*, *supra*, 46 Cal.4th at p. 602; *People v. Carkhum-Murphy*, *supra*, 41 Cal.App.5th at p. 295.) "'The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded.'" (*People v. Hinton*, *supra*, 37 Cal.4th at p. 887; accord, *People v. Clark* (2011) 52 Cal.4th 856, 932.)

Even if the trial court erred in admitting evidence of Jetson's prior convictions, such error does not require reversal unless the error caused a miscarriage of justice. (Evid. Code, §§ 353, subd. (b), 354; *People v. Richardson* (2008) 43 Cal.4th 959, 1001.) "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'"' (*Richardson*, at p. 1001, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Lazarus* (2015) 238 Cal.App.4th 734, 787, fn. 53.)

c. *The Trial Court Did Not Abuse Its Discretion, and Any Error Was Harmless*

Jetson argues the trial court should have excluded evidence of his prior convictions as unduly prejudicial under Evidence Code 352 because they were all remote in time. In *People v. Davis*, *supra*, 46 Cal.4th 539 the Supreme Court held the defendant's 17-year-old crimes were admissible under Evidence Code section 1101, which governs the admissibility of prior crimes "'to prove some fact (such as motive, opportunity, intent, . . .) other than his or her disposition to commit such an act.'" (*Davis*, at p. 602.) The Supreme Court explained the prior crimes "were not so remote as to warrant their exclusion, as defendant had only remained free from incarceration for a total of three years during the intervening period." (*Ibid.*) The Supreme Court cited *People v. Peete* (1946) 28 Cal.2d 306, which held the defendant's 23-year-old conviction for murder was admissible at a subsequent murder trial because the defendant had been incarcerated for 18 of those years, and after his release he was

under the supervision of a parole officer for an additional period of time. (See *Davis*, at p. 602, citing *Peete*, at pp. 308-309, 318-319.) Jetson similarly was in prison for many of the 18 years between his 1996 conviction for assault with a firearm and his shooting of Suazo, including prison terms following all three prior convictions.

The trial court did not abuse its discretion in ruling the passage of time from offense to offense did not justify excluding Jetson's prior convictions under the California Constitution and Evidence Code sections 352 and 788. Jetson's prior convictions were all for crimes of moral turpitude, and the duration of Jetson's crime-free life was not long. (See *People v. Anderson*, *supra*, 5 Cal.5th at p. 408 ["'Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior.'"]; *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926 [11- and 21-year-old convictions were not too remote in time under Evidence Code sections 352 and 788 where the defendant suffered multiple convictions and served several prison terms between offenses].) Jetson's citation to *People v. Johnson* (2010) 185 Cal.App.4th 520 for the proposition that "a conviction 10 years or more in the past is presumptively remote" ignores the fact that *Johnson* concerned Evidence Code section 1109 governing evidence of a defendant's prior acts of domestic violence, which has a specific provision stating that "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the

interest of justice." (Evid. Code, § 1109, subd. (e); see *Johnson*, at p. 537.)[5]

With respect to his prior conviction for assault with a firearm, Jetson also argues the jury was likely to find him guilty because he "committed a similar incident in the past" and because his prior conviction would "evoke an emotional bias against [him]." The trial court, however, considered all of the relevant factors—the effect of the prior crimes on Jetson's veracity and how remote and similar they were to the charged offense—in deciding whether to admit Jetson's prior convictions. (See *People v. Carkhum-Murphy*, *supra*, 41 Cal.App.5th at

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[5] Whether Jetson's prior conviction for assault with a firearm was too remote to be admitted under Evidence Code section 1103, subdivision (b), is a closer question. Jetson's intervening crimes were not violent crimes and thus were not relevant to Jetson's character for violence. (See *People v. Fuiava*, *supra*, 53 Cal.4th at p. 700 [Evidence Code section 1103, subdivision (b), "limits the admissible evidence to that establishing the defendant's character for violence"].) Because Jetson's conviction for assault with a firearm was admissible under Evidence Code section 788, however, any error resulting from its admission under Evidence Code section 1103, subdivision (b), was harmless in the absence of a request by Jetson for a limiting instruction. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 406 ["If an uncharged act is relevant to prove some fact other than propensity, the evidence is admissible, subject to a limiting instruction upon request."]; see also Evid. Code, § 1101 [evidence "offered to support or attack the credibility of a witness" is admissible, even if it may not be admissible to show propensity for a given act].)

p. 295.)[6] Although the circumstances surrounding the prior conviction for assault with a firearm were similar in some respects to those pertaining to the murder charge, they were not identical, and even if they were, "'[p]rior convictions for the identical offense are not automatically excluded.'" (*People v. Mendoza*, *supra*, 78 Cal.App.4th at p. 926; see *People v. Clark*, *supra*, 52 Cal.4th at p. 932 ["Although the similarity between the prior convictions and the charged offenses is a factor for the court to consider when balancing probative value against prejudice, it is not dispositive."]; *People v. Dillingham* (1986) 186 Cal.App.3d 688, 695 ["the fact that the three prior convictions were for the same offense . . . as the charged crime no longer compels their exclusion"].) Indeed, """[t]he identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion."'" (*Mendoza*, at p. 926.) The trial court did not abuse its discretion in finding that Jetson's prior assault conviction was highly probative of his testimony he acted in self-defense and that the possibility of confusion caused by any similarity did not substantially outweigh the probative value of the evidence.

In any event, any error in admitting Jetson's 1996 conviction for assault with a firearm was harmless because Jetson has not shown a reasonable probability he would have obtained a more favorable verdict had the trial court excluded it. (See *People v. Thomas* (2011) 52 Cal.4th 336, 356.) It is true that, in his closing argument, the prosecutor referred to Jetson's 1996 conviction and reminded the jury Jetson "had shot people before,

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[6] The effect of Jetson's prior conviction if he did not testify is not a relevant factor because Jetson testified. (See *People v. Mendoza*, *supra*, 78 Cal.App.4th at p. 926.)

[and] knew he had the wherewithal to do something like that." The prosecutor used Jetson's prior conviction to impeach Jetson's testimony that he shot Suazo in self-defense: "What about [Jetson's] credibility of this being self-defense? In San Bernardino County he was convicted of assault with a firearm. . . . He shot another man before. So in 2014 when [Jetson] arms himself with a gun and he knows somebody is looking for him, there's no question in his mind if he has the wherewithal to shoot another human being if the time comes. He's done it before. He has that ability. So evaluate that credibility. Back then—on the stand he's saying back then it was in self-defense, and now again he's saying it's self-defense."

The jury, however, did not accept the prosecutor's argument. The jury believed Jetson when he said he acted in self-defense, albeit imperfect. The jury's verdict turned on whether the jury believed Jetson when he testified that Suazo turned to look at him and reached for something Jetson believed was a gun. As discussed, the People introduced substantial evidence that Jetson's testimony was not consistent with the forensic evidence or Jetson's prior statements to police. Jetson has not shown that excluding or sanitizing his prior conviction for assault with a firearm would have made the jury more likely to believe Jetson's version of events. Nor has he shown the jury's verdict was the result of an emotional response to his prior conviction. Indeed, the jury asked the court to identify the difference between "reasonably believed and actually believed" and how to define "imminent." Such questions do not support Jetson's argument that the jury reflexively convicted him as a result of emotional bias. Thus, it is not reasonably probable that,

had the trial court excluded Jetson's conviction for assault with a firearm, Jetson would have obtained a more favorable result.[7]

2. *The Trial Court Did Not Err in Excluding Baxter's Hearsay Statement Suggesting Suazo Was Armed*

Jetson argues the trial court erred and violated his rights to a fair trial and to present evidence by excluding a statement Baxter allegedly made to a defense investigator after Baxter contacted the office of counsel for Jetson and said he wanted to cooperate. According to Jetson, Baxter said "he believed that either [Suazo's brother or girlfriend] had taken [a] firearm out of [Suazo's] car" when Baxter arrived at Suazo's house with Suazo's body.[8] Counsel for Jetson argued Baxter's statement was admissible under the hearsay exception for declarations against interest because Baxter admitted he and Suazo went to the motel with a gun.

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[7] Because the trial court did not commit prejudicial error in admitting the substance of Jetson's prior convictions, it did not err by failing to sanitize them or violate Jetson's right to due process. (See *People v. Woodruff*, *supra*, 5 Cal.5th at p. 723, fn. 3.)

[8] At trial counsel for Jetson also suggested Baxter equivocated on whether there ever was a gun in the car. She said, "[Baxter] came into our office and gave a statement to my investigator. And that's when . . . he stated that either [Suazo's girlfriend or brother] *likely* took the gun out of the car when [Baxter] arrived [at Suazo's house]." (Italics added.) The trial court asked, "Is that all he said about the gun?" Counsel for Jetson replied, "That's all he said about the gun."

The trial court ruled the statement was not a declaration against interest under Evidence Code section 1230 because Baxter did not make the statement in circumstances that demonstrated sufficient reliability or trustworthiness. The court explained that Baxter did not make the statement under oath, that he refused to give the police a statement when they arrived at Suazo's house, and that, when Baxter ultimately agreed to speak to police detectives, he lied. The court also questioned whether the statement was sufficiently inculpatory, but acknowledged that if Baxter appeared at trial the court would appoint counsel for him.

a. *The Declarations Against Interest Exception*

Hearsay statements are generally inadmissible unless they fall under an exception. (Evid. Code, § 1200, subd. (b); see *People v. Sanchez* (2016) 63 Cal.4th 665, 674.) One exception, codified in Evidence Code section 1230, "provides that the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was so far against the declarant's interests, penal or otherwise, that a reasonable person would not have made the statement unless he or she believed it to be true. ""The proponent of such evidence must show 'that the declarant is unavailable, that the declaration was against the declarant's penal [or other] interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.""" [Citation.] 'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning

of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. [Citations.]' [Citation.] We review the trial court's finding for an abuse of discretion." (*People v. Westerfield* (2019) 6 Cal.5th 632, 704.) "The determination of whether a statement was against the declarant's interest when made is reviewed for abuse of discretion." (*People v. Dalton* (2019) 7 Cal.5th 166, 207; see *People v. Brown* (2003) 31 Cal.4th 518, 534-535.)

b. *The Trial Court Did Not Abuse Its Discretion in Excluding Baxter's Statement as Unreliable*

Jetson argues the trial court erred in ruling that, for a declaration against interest to be trustworthy, the declarant must have made the statement under oath. The trial court, however, did not find Baxter's statement untrustworthy solely because it was not under oath; the court properly considered the totality of the circumstances in ruling the statement was untrustworthy. (See *People v. Grimes* (2016) 1 Cal.5th 698, 715.)

Jetson also argues that Baxter's statement, like the statement in *People v. Brown, supra*, 31 Cal.4th 518, was sufficiently reliable. In *Brown* the trial court admitted a statement by the declarant during a police interrogation while the declarant was under arrest for suspicion of murder. The Supreme Court in *Brown* held that the declarant's concession that he participated in a robbery murder was "an admission 'so far contrary to the declarant's interests "that a reasonable man in

his position would not have [admitted it] unless he believed it to be true.'"" (*Id.* at p. 536.) The circumstances of Baxter's statement, however, were very different from those in *Brown*. Baxter made the statement to a defense investigator more than two years after the shooting and only after Baxter told counsel for Jetson that he wanted "the truth . . . to come out" because "he felt Mr. Jetson was an innocent man." Baxter claimed that he tried to contact the District Attorney's office and the police, but that "[h]e was given the run-around." The prosecutor said there was no evidence Baxter ever attempted to contact anyone in the District Attorney's office, thus raising suspicions about Baxter's motivation in talking with Jetson's investigator.

Even more telling was that even counsel for Jetson admitted she did not believe all of Baxter's statements, and Baxter proved to be an unreliable declarant in other respects as well. For example, while still at Suazo's house after the shooting, Baxter told a detective there was no operable phone in Suazo's car as he drove Suazo's body back to the house. In fact, Baxter received a call from Suazo's brother on his phone, and Suazo's phone was in the car. Baxter also told detectives that he and Suazo had gone to the motel to collect $40 from "James," but that there was no one staying at the motel by that name. Given the multiple occasions on which Baxter gave false information to police, the trial court did not abuse its discretion or violate Jetson's constitutional rights by excluding Baxter's out-of-court statement as unreliable.

3. *The Trial Court Did Not Err in Excluding a Portion or All of the Recording of Jetson's Police Interview*

a. *Relevant Proceedings*

Two homicide detectives interviewed Jetson at the police station after arresting him. The People introduced a portion of Jetson's recorded interview at trial to impeach Jetson's testimony that Suazo looked at Jetson before Jetson shot him. In the interview Jetson told detectives Suazo was looking at the motel. Counsel for Jetson sought to introduce other portions of Jetson's interview pursuant to the "rule of completeness" under Evidence Code section 356. Counsel for Jetson argued that, because the People "opened the door" by implying Jetson was not fearful, Jetson was entitled to introduce portions of his interview where he told detectives he was scared and feared for his life. According to counsel for Jetson, Jetson's prior consistent statements would "rehabilitate" him after the People implied he was not scared.

The People argued that the portions of the interview transcript Jetson sought to admit were hearsay, that Jetson was available to answer questions from his counsel during re-direct examination, and that the rule of completeness did not apply because the portion of the interview introduced by the People did not concern whether Jetson was scared. The trial court ruled the additional portions of the interview were inadmissible because they did not concern where Suazo was looking before Jetson shot him. The trial court also ruled that playing the entire interview, which counsel for Jetson later requested, would consume an undue amount of time under Evidence Code section 352.

Jetson argues the trial court erred by excluding the entirety of his interview with police after the trial court admitted a portion of that interview at the request of the People. He also appears to argue the trial court erred by excluding the portions of his interview in which he told detectives he was scared, although that argument does not appear in the headings of Jetson's briefs on appeal. Neither argument has merit.

b. *Neither the Portions of Jetson's Interview Nor Its Entirety Pertained to or Provided Necessary Context for the Portion Admitted*

"[O]ften called the rule of completeness," the rule set forth in Evidence Code section 356 provides: "'Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.'" (*People v. Armstrong* (2019) 6 Cal.5th 735, 786.) "'The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which "have some bearing upon, or connection with, the admission . . . in evidence."'" (*Armstrong*, at p. 786.) "'Statements pertaining to other matters may be excluded.'"

(*People v. Chism* (2014) 58 Cal.4th 1266, 1324; see *People v. Samuels* (2005) 36 Cal.4th 96, 130.)

"The rule reflects the ""equitable notion"" that a party seeking introduction of one part of a statement cannot selectively object to introduction of other parts necessary to give context. [Citation.] 'Although framed as an expansion of the concept of relevancy, Evidence Code [section] 356 most often operates in the manner of a hearsay exception.'" (*People v. Armstrong*, *supra*, 6 Cal.5th at p. 787.) We review the trial court's determination of whether or not to admit evidence under Evidence Code section 356 for abuse of discretion. (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 73.)

The trial court admitted a very small portion of Jetson's interview, 17 lines from one page of a 120-page transcript, relating only to the issue where Suazo was looking before Jetson shot him. The only additional portions of the transcript admissible under the rule of completeness were portions that had some bearing on, or were necessary to avoid creating a misleading impression about, the portion admitted. (*People v. Chism*, *supra*, 58 Cal.4th at p. 1324.) Jetson, however, sought to introduce portions of the interview and the interview in its entirety to inform the jury about Jetson's state of mind, that is, that he was scared. According to counsel for Jetson, the portion of the interview introduced by the People implied Jetson was not scared of Suazo, and Jetson sought to admit the rest of the interview or portions of it to show he was.

The trial court did not abuse its discretion in rejecting this argument under Evidence Code section 356. The portion of Jetson's interview the trial court admitted did not mislead the jury into believing Jetson was not afraid of Suazo, regardless of

where Suazo was looking. (See *People v. Chism*, *supra*, 58 Cal.4th at p. 1325 [excluding a portion of a witness's statement about the reason the defendant said he shot the victim because the admitted portion of the statement "related solely to what [the witness] perceived during the planning of [a] robbery and the events leading to and immediately following the crimes"].)

The court also did not abuse its discretion in excluding the entirety of the interview under Evidence Code section 352 on the ground it would consume an undue amount of time. As stated, the full transcript was 120 pages and did not relate to the subject matter of the admitted portion. (See *People v. Dalton*, *supra*, 7 Cal.5th at p. 214 [trial court may exclude evidence "'if its probative value is substantially outweighed by the probability that its admission will . . . necessitate undue consumption of time'"].) And because the trial court did not err in excluding the portion of the interview offered by Jetson, or the entirety of the interview, the trial court did not violate Jetson's constitutional rights. (See *People v. Woodruff*, *supra*, 5 Cal.5th at p. 723, fn. 3 ["'Because we find no error, we necessarily also find no constitutional violation,'" and therefore "'we provide no separate constitutional discussion.'"].)

4. *The Trial Court Did Not Err in Excluding Evidence of Baxter's Prior Convictions and Parole Status*

Jetson sought to admit evidence that Baxter had a criminal record and that he had absconded from parole a few months before trial. Counsel for Jetson argued this evidence would show Jetson "had a legitimate fear" of Baxter and would buttress Jetson's testimony that he did not go to the police because he

feared retribution from Baxter, who did not "play by the regular rules that we play by." The trial court excluded evidence of Baxter's criminal record as cumulative under Evidence Code section 352 and inadmissible under Evidence Code section 1103. The trial court excluded testimony from Baxter's parole agent as speculative and not relevant. Jetson argues the evidence was relevant to his "state of mind" when he shot Suazo because evidence of Baxter's prior convictions and parole status "would have independently corroborated and solidified the reasonableness of [Jetson's] fear in this close case" and would have established Baxter's threatening character. He also argues the evidence was admissible under Evidence Code section 1103.

The trial court did not abuse its discretion in excluding Baxter's parole status because it was irrelevant to Jetson's state of mind at the time of the shooting. Baxter did not abscond from parole until several months before trial, approximately four years after Jetson shot Suazo. Baxter's future parole status could not have affected Jetson's state of mind at the time of the shooting. (See *People v. Young* (2019) 7 Cal.5th 905, 931 [""The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive.""].)

The trial court also properly exercised its discretion to exclude evidence of Baxter's prior convictions. The evidence was arguably relevant, as Jetson argues, to corroborate Jetson's well-founded fear of Baxter. But to the extent Jetson reasonably believed Baxter was a violent criminal, and Jetson provided uncontroverted testimony that he did, evidence of Baxter's actual criminal record was not particularly probative. To the extent it was, the trial court did not abuse its discretion by excluding it as

cumulative. (See *People v. Trujeque* (2015) 61 Cal.4th 227, 269 [Evidence Code section 352 allows a court to exclude relevant evidence as cumulative].) Jetson and others testified Baxter was a member of the Mexican Mafia, had gang tattoos, committed violent crimes, served a lengthy prison term, and bragged about owning guns. The People did not contest this evidence or attempt to portray Baxter in a softer light. The details of Baxter's actual criminal record lent little additional value to the already overwhelming evidence of Baxter's criminal life.

Jetson argues Baxter's prior criminal convictions and parole status were also admissible under Evidence Code section 1103 "to prove [Jetson's] state of mind, not as character evidence." As the People argued and the trial court correctly ruled, however, Evidence Code section 1103 concerns prior crimes evidence regarding *the victim*, not third parties. Jetson offers no contrary authority. Because there was no error, there was no constitutional violation. (*People v. Woodruff*, *supra*, 5 Cal.5th at p. 723, fn. 3.)

5. *Jetson's Argument the Trial Court Erred in Admitting Evidence of His Past Membership in a Criminal Street Gang Is Forfeited and Meritless, and Any Error Was Harmless*

Prior to trial the People moved to strike the gang allegation under section 186.22, but indicated they intended to introduce evidence of Jetson's prior gang affiliation to rebut Jetson's character evidence. At trial, a police officer testified Jetson had admitted he was or had been a member of a gang. Jetson argues the trial court erred and violated due process by admitting this

evidence because the evidence was more prejudicial than probative under Evidence Code section 352.

a. *Relevant Proceedings*

In 2013, during a brief encounter with Pomona police Sergeant Scott Hess, Jetson admitted he was or previously had been a member of a criminal street gang. Sergeant Hess filled out a field identification card indicating Jetson had admitted he was a gang member. Jetson objected that Sergeant Hess's proffered testimony was highly prejudicial because Jetson had not affiliated with a gang for 15 or 20 years, the People no longer alleged the offenses were gang-related, none of Jetson's prior offenses was gang-related, and to call Jetson a gang member would mislead the jury. The trial court said it would rule on Jetson's objections after hearing Sergeant Hess's testimony.

During the defense case the prosecutor asked to call Sergeant Hess on a Friday afternoon due to a scheduling conflict. Jetson objected the field identification card was hearsay and argued Sergeant Hess's testimony would be highly prejudicial if "the last thing [the jurors] hear for the weekend is that [Jetson] is a gang banger." The prosecutor said he would use the field identification card only to refresh Sergeant Hess's recollection and argued the People had allowed the defense to call an expert out of order. The trial court ruled: "I don't think it's prejudicial to have [Sergeant Hess] testify now or later. It's information that will come in. . . . If we have enough time, I will allow this. I anticipate this witness to be very short. I would allow it over your objection."

Later that day Sergeant Hess testified. When the People sought to introduce the field identification card as an exhibit,

counsel objected the statements in the document were hearsay. The trial court overruled the objection and admitted the exhibit. Counsel for Jetson did not renew her objections to the content of Sergeant Hess's testimony. On cross-examination counsel for Jetson elicited testimony that Sergeant Hess did not recall whether he had asked Jetson if he was currently a gang member or whether he had asked Jetson if he had ever been a gang member. Sergeant Hess also said he did not write on the field identification card whether Jetson wore any gang apparel, exhibited gang signs, had gang tattoos, identified any gang associates, or was arrested (or stopped) with any gang members.

b. *Jetson Forfeited This Argument*

The People contend Jetson forfeited the argument the trial court erred in admitting evidence of Jetson's prior gang affiliation because Jetson did not object to the content of Sergeant Hess's testimony or obtain a final ruling on his objection to Sergeant Hess's testimony under Evidence Code section 352. The People are correct that a pretrial evidentiary objection the court does not rule on will not preserve the issue for appeal "if the appellant could have, but did not, renew the objection . . . and press for a final ruling in the changed context of the trial evidence itself." (*People v. Holloway* (2004) 33 Cal.4th 96, 133; accord, *People v. Ennis* (2010) 190 Cal.App.4th 721, 735-736; see, e.g., *People v. Johnson* (2018) 6 Cal.5th 541, 586 [defendant forfeited the argument the trial court erred in tentatively sustaining an objection because the defendant "fail[ed] to press for a final ruling"]; *People v. Valdez* (2012) 55 Cal.4th 82, 143 ["'[f]ailure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the

trial court of the opportunity to correct potential error in the first instance'"].) The trial court made clear during the pretrial hearing that it had not ruled on Jetson's objections to the substance of Sergeant Hess's testimony, including that it was more prejudicial than probative, and that the court would hear further argument on the issue when Sergeant Hess testified. By not pursuing the matter, Jetson forfeited it. (See *Ennis*, at p. 736; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1181.)

c. *Evidence of Jetson's Prior Gang Affiliation Was Admissible To Rebut Jetson's Defense Based on Evidence of His and Suazo's Character, and Any Error Was Harmless*

Even if Jetson had not forfeited the argument, it lacks merit. As discussed, "'[w]hen a criminal defendant presents opinion or reputation evidence on his own behalf the prosecutor may present like evidence to rebut the defendant's evidence and show a likelihood of guilt.'" (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 357; see Evid. Code, § 1102, subd. (b).) "A defendant who elicits character or reputation testimony opens the door to the prosecution's introduction of . . . evidence that undermines testimony of his good reputation or of character inconsistent with the charged offense. . . . [T]he price a defendant must pay for attempting to prove his good name is to throw open a vast subject which the law has kept closed to shield him." (*Tuggles*, at p. 357; see Evid. Code, §§ 1101, 1102.) Where the People seek to introduce evidence of a defendant's gang membership, however, "[t]rial courts should carefully scrutinize [whether] such evidence 'creates a risk the jury will improperly

infer the defendant has a criminal disposition and is therefore guilty of the offense charged.'" (*People v. Melendez* (2016) 2 Cal.5th 1, 28-29.) Once a defendant interjects evidence of a victim's alleged gang membership to show the defendant feared the victim, a trial court has discretion to permit questions regarding the defendant's gang affiliation "to present a more balanced picture and to aid the jury in evaluating defendant's claim that he was afraid of [the victim's] gang." (*Id.* at p. 29; see *People v. Jordan* (2003) 108 Cal.App.4th 349, 365-366 [trial court did not err in allowing the People to present evidence of the defendant's gang membership where the defendant, to show the drugs he possessed belonged to gang members, presented evidence that gang members sold drugs in the area].)

The trial court did not abuse its discretion in allowing Sergeant Hess to testify Jetson admitted he had been affiliated with a gang. (See *People v. Melendez*, *supra*, 2 Cal.5th at p. 29 [reviewing the trial court's admission of the defendant's gang membership for abuse of discretion].) The People were allowed to introduce this evidence after Jetson presented evidence Suazo was a gang member to support Jetson's testimony he was afraid of Suazo. Evidence of Jetson's gang membership, even if remote in time, was relevant to the jury's consideration of Jetson's well-founded fear of Suazo, and in light of other evidence was not highly inflammatory. For example, the jury heard evidence Jetson sold drugs for a living in a neighborhood known for gang activity. The jury also heard Jetson developed a business relationship of sorts with Suazo and Baxter even though Jetson believed Suazo and Baxter were gang members. In light of this evidence, Sergeant Hess's testimony regarding Jetson's past gang membership was not particularly inflammatory. (See *People v.*

Garcia (2016) 244 Cal.App.4th 1349, 1358 ["gang evidence was not any more inflammatory" than other testimony].)

In any event, any error in admitting Sergeant Hess's testimony did not prejudice Jetson or violate his constitutional rights. Based on evidence of Jetson's relationship with Suazo and Baxter, the jury reasonably could have inferred Jetson was a member of a gang, even without Sergeant Hess's testimony. The primary factual issue for the jury was whether Jetson was in imminent danger at the time he shot Suazo, which ultimately came down to the credibility of Jetson's testimony regarding where Suazo was looking when Jetson shot him. Given the forensic evidence, Jetson's statement to the police shortly after the shooting, and Jetson's testimony that he sold drugs to known gang members, it is unlikely the jury relied on evidence of Jetson's past gang membership to resolve this issue. (See *People v. Melendez*, *supra*, 2 Cal.5th at p. 29.) There is no reasonable probability that the verdict would have been different had the trial court excluded Sergeant Hess's testimony.

D. *The Prosecutor Did Not Commit Misconduct by Misstating the Law of Self-defense*

Jetson contends the prosecutor misstated the law and prejudiced him by arguing to the jury that self-defense required Jetson to reasonably fear death or serious injury "at the moment" he shot Suazo, as opposed to having an "imminent" fear of death. There was no prosecutorial misconduct.

1. *Relevant Proceedings*

The trial court instructed the jury on the law of self-defense and imperfect self-defense using CALCRIM Nos. 505 and 571,

respectively. CALCRIM No. 505 provides in part: "The defendant acted in lawful self-defense if . . . [t]he defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury." CALCRIM No. 571 defines a danger as "imminent" if, "when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future." Jetson did not object to these instructions.

In his closing argument the prosecutor stated, "Belief in future harm is not sufficient [for lawful self-defense]. . . . No matter how great or how likely the harm is believed to be. [Suazo] and Richard Baxter showed up at the [motel] at 2:00 p.m. looking for [Jetson]. There's no question. . . . But how great, how imminent is the harm, when [Suazo] is simply seated in the passenger car looking across the street? At that very moment what danger does he pose? And, by the way, this self-defense, you have to evaluate these elements at the moment of the shooting." Counsel for Jetson objected that the prosecutor misstated the law, and the trial court overruled the objection. The trial court instructed the jurors they would "have the law and . . . will decide how the facts fit into the law."

The prosecutor continued: "At the moment he pulls that trigger, that's when you evaluate these elements. Was his fear reasonable, was the fear of danger or death imminent, was he acting on that belief of fear? That's when you evaluate the self-defense." Counsel for Jetson objected again. The court tentatively overruled the objection, but stated it would hear Jetson's argument at the conclusion of the prosecutor's closing argument. The prosecutor continued: "Imperfect self-defense

occurs when the defendant actually believes he was in imminent danger, and he actually believed that the immediate use of deadly force was necessary, but one of those beliefs was unreasonable. . . . Was it unreasonable to believe he was in imminent danger when [Suazo] was seated in a car looking across the street? Yeah. Again, there's a requirement that the danger must be imminent. In that jury instruction it defines . . . imminent." The prosecutor continued by reading to the jury the portion of CALCRIM No. 571 that defines "imminent."

Outside the presence of the jury counsel for Jetson argued the prosecutor had improperly suggested in his closing argument that Jetson had to wait for Suazo to assault him before Jetson could shoot him. "[S]tand your ground," argued counsel for Jetson, "means that you don't have to wait for them to pull the trigger." The court ruled the prosecutor's argument accurately reflected the law, which considers a defendant's fear "at the time that the force, whatever that force may be, was used. Now, maybe . . . it doesn't have to be the nanosecond that the trigger is pulled, that you can look back at events preceding and leading up to the time that the deadly force was used. But I don't think anything that [the prosecutor] said in his closing argument misstated that."

2. *The Prosecutor Did Not Misstate the Law*

""[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements."" (*People v. Bell* (2019) 7 Cal.5th 70, 111; accord, *People v. Cortez* (2016) 63 Cal.4th 101,

130.) "Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] To establish misconduct, defendant need not show that the prosecutor acted in bad faith. [Citation.] However, [the defendant] does need to 'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."'" (*Cortez*, at p. 130; see *People v. Centeno* (2014) 60 Cal.4th 659, 667.) "'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*Centeno*, at p. 667; see *People v. Henderson* (2020) 46 Cal.App.5th 533, 548.) "If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.'" (*Cortez*, at p. 130; see *Henderson*, at p. 548 ["The reviewing court must consider the challenged statements in the context of the argument as a whole to make its determination."].)

Jetson argues the prosecutor suggested to the jury Jetson had to wait for Suazo to draw a weapon before Jetson could defend himself. The prosecutor did not say or suggest that. The prosecutor argued Jetson could not have had a reasonable fear of imminent harm when Suazo was in the car "looking across the street." This is an accurate statement of the law, pursuant to which a jury reasonably can conclude danger is not imminent

unless an aggressor has "advance[d] towards [the defendant], otherwise act[ed] in a physically threatening manner, or appear[ed] to reach for [a weapon]." (*People v. Brady*, *supra*, 22 Cal.App.5th at p. 1018.) Jetson appears to be arguing that, under the circumstances, and especially in light of Suazo's attempt on Jetson's life two days earlier, Suazo physically threatened Jetson by merely showing up at Jetson's former residence. But the jury concluded that was not enough to bridge the gap between "future" harm, even if very likely and very serious, and "imminent" harm. (See *People v. Manriquez*, *supra*, 37 Cal.4th at p. 581 [fear of future harm is not enough to show a reasonable belief in imminent harm]; *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [jurors can "understand the difference between imminent danger and future harm, one being immediate and the other not"].) The prosecutor's argument did not blur the line between these two concepts, and Jetson has not explained how, in the context of the prosecutor's entire argument and the jury instructions, the jury reasonably would have understood the prosecutor meant the jury could not acquit Jetson unless Suazo had drawn a weapon or otherwise assaulted Jetson. (See *People v. Cortez*, *supra*, 63 Cal.4th at p. 130.) Indeed, the trial court emphasized, including when counsel for Jetson objected to one of the statements in the prosecutor's closing argument, that the jurors should follow the court's instructions rather than anything the attorneys said that might be contrary to the instructions. (See *id.* at p. 132 [trial court's instructions and comments regarding the prosecutor's arguably contrary argument ameliorated any possible jury confusion].) And Jetson does not contend the jury instructions were incorrect. Because the

prosecutor did not misstate the law, there was no prosecutorial misconduct.

E. *Jetson's Sentence Must Be Vacated*

Jetson argues the trial court erred and violated due process by imposing each of the sentence enhancements, sentencing Jetson under the three strikes law, failing to stay execution of his sentence on count 2 under section 654, and imposing fines and fees without determining his ability to pay. Jetson also argues his cumulative sentence constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Because we agree with some of Jetson's arguments, we vacate his sentence and remand for resentencing.

1. *The Prior Prison Term Enhancement*

The trial court enhanced Jetson's sentence by one year under section 667.5, subdivision (b). At the time of Jetson's sentencing, section 667.5, subdivision (b), provided a "one-year enhancement for each prior separate prison term, unless the defendant remained free from both prison custody and the commission of a new felony for a five-year period after discharge." (*People v. Gastelum* (2020) 45 Cal.App.5th 757, 772.) Senate Bill No. 136, however, amended section 667.5, subdivision (b), to apply the one-year prior prison term enhancement only if the defendant served a prior prison term for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). (See § 667.5, subd. (b), as amended by Stats. 2019, ch. 590, § 1; *Gastelum*, at p. 772.) The amended statute became effective January 1, 2020, and because the judgment

against Jetson is not yet final, the amended statute applies. (See *Gastelum*, at p. 772; *People v. Petri* (2020) 45 Cal.App.5th 82, 94.)

The People did not allege Jetson served a prior prison term for a sexually violent offense within the meaning of Welfare and Institutions Code section 6600, subdivision (b). Thus, the one-year prior prison term enhancement imposed under former section 667.5, subdivision (b), cannot stand. Jetson's arguments that he did not make a knowing and voluntary admission of the prior prison term allegations and that the trial court abused its discretion by imposing the prior prison term enhancement are moot.

2. *The Three Strikes Sentence and the Firearm Use Enhancement*

Jetson argues the trial court abused its discretion in denying his motion under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530 (*Romero*) to strike his prior serious or violent felony conviction for purposes of the three strikes law and the firearm use enhancement under section 12022.5. Section 1385 "allows a judge the discretion to dismiss or strike a sentencing enhancement, or strike the additional punishment for the enhancement, in furtherance of justice." (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1020; see § 1385, subds. (a), (b)(1).)

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background,

character, and prospects, the defendant may be deemed outside the [three strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161; accord, *People v. Solis* (2015) 232 Cal.App.4th 1108, 1124; see *People v. Vargas* (2014) 59 Cal.4th 635, 646 ["when ruling on a defendant's *Romero* motion [citation], trial courts should consider, among other things, the nature and circumstances of the prior convictions and whether the defendant falls outside the spirit of the Three Strikes law"].) "[A] court may not dismiss a strike solely for judicial convenience, in exchange for a guilty plea, or based on antipathy to the Three Strikes law. Instead, in determining whether to strike a prior conviction, the trial court must look to 'factors intrinsic to the [Three Strikes] scheme.'" (*People v. Johnson* (2015) 61 Cal.4th 674, 688.)

"[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*); see *People v. Lua*, *supra*, 10 Cal.App.5th at p. 1020.) An abuse of discretion occurs, for example, where the trial court was not aware of its discretion to dismiss a prior conviction, where the court considered impermissible factors in declining to dismiss a prior conviction, or where imposing the three strikes

law produces an arbitrary, capricious or patently absurd result under the facts of a particular case. (*Carmony*, at p. 378; *Lua*, at p. 1020.)

"'[I]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation.] Where the record is silent [citation] or '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.'" (*Carmony*, *supra*, 33 Cal.4th at p. 378.) Only extraordinary circumstances where the relevant factors manifestly support the striking of a prior conviction will support a finding that a career criminal falls outside the spirit of the three strikes law. (*Ibid.*) The burden is on the party challenging the sentence to clearly show the sentence was irrational or arbitrary. (*Id.* at p. 376; *People v. Leavel* (2012) 203 Cal.App.4th 823, 837.)

Jetson failed to meet that heavy burden. His felony criminal history began in 1996, when he pleaded no contest to assault with a firearm. Jetson was sentenced to two years in prison and paroled in 1997. In 1999 he was arrested and convicted of possession of cocaine for sale and sentenced to six years in prison. Within two years of his release he was again arrested and convicted of possessing drugs for sale and sentenced to another six-year prison term. Jetson was paroled in March 2011, and by April 2011 had been arrested again on drug charges. And Jetson was on postrelease community supervision when he shot Suazo. Between 1999, when Jetson committed his first serious or violent felony, and 2014, when he committed the crime in this case, Jetson spent much of his time committing crimes,

serving prison terms, and violating probation. The trial court did not abuse its discretion in ruling Jetson did not fall outside the spirit of the three strikes law. (See *People v. Williams, supra*, 17 Cal.4th at p. 163 [defendant was not "outside the spirit of the Three Strikes law" where he "did not refrain from criminal activity during [the] span of time . . . between his prior serious and/or violent felony convictions and his present felony"]; *People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [defendant who committed his current crime while on parole and who had not led a "'legally blameless life'" between his 20-year-old prior and current convictions could be sentenced under the three strikes law].)

The court also did not abuse its discretion in imposing the firearm enhancement under section 12022.5. The court recognized it had discretion under section 12022.5, subdivision (c), to strike or dismiss the firearm enhancement, but declined to do so. Jetson argues only that the failure to dismiss the enhancement "fell outside the bounds of reason[ ] given the uncontroverted evidence of self-defense against a relentless attacker." The jury, however, rejected Jetson's self-defense theory, and the trial court stated in denying Jetson's *Romero* motion that Jetson "decided to take . . . matters into his own hands" rather than call the police or avoid Suazo. The circumstances in this case did not compel the trial court to dismiss the firearm use enhancement.

3. *The Consecutive Sentence on Count 2*

Jetson argues the trial court erred under section 654 and violated his federal due process rights in sentencing him to a consecutive term on count 2. Section 654 bars multiple

punishment for a single "'act or omission.'" (*People v. Ramirez* (2006) 39 Cal.4th 398, 478; see *People v. Venegas* (2020) 44 Cal.App.5th 32, 38.) "'Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination.'" (*People v. Cruz* (2020) 46 Cal.App.5th 715, 737; see *Venegas*, at p. 38.) With respect to additional punishment for using a gun, the conduct is divisible, and additional punishment therefore proper, "where the evidence shows a possession distinctly antecedent and separate from the primary offense." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1379 ["'[S]ection 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm.'"].) A trial court's findings under section 654 "'will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jacobo* (2019) 37 Cal.App.5th 32, 53-54; see *Cruz*, at p. 737; *Venegas*, at p. 38.)

The trial court correctly found section 654 did not apply because Jetson had the gun and completed the crime of possession of a firearm by a felon at the time he "took that gun in his hand and . . . crossed the street or [was] behind the liquor store." In fact, the record provides even stronger evidence that Jetson's possession of the gun he used to shoot Suazo was a separate offense from voluntary manslaughter. Jetson testified that he obtained the gun well in advance of the shooting and that he bought the gun "off the street" after Suazo attempted to kill

him and then carried the gun in his pocket for protection. The evidence was uncontroverted that Jetson arrived at the crime scene already in possession of the firearm he used to shoot Suazo. The firearm possession was a separate and antecedent offense.

Citing *People v. Bradford* (1976) 17 Cal.3d 8, Jetson argues section 654 applies where a felon possesses a firearm "moments before [a] shooting" as "part of a continuous course of action." In *Bradford* the defendant used a gun taken from a police officer to shoot the officer. (*Id.* at p. 22.) The Supreme Court held section 654 applied because the defendant's possession of the gun was not "'antecedent and separate' from his use of the [gun] in assaulting the officer." (*Ibid.*) Here, there was no such evidence that "fortuitous circumstances" placed the firearm in Jetson's hand moments before he shot Suazo. (See *People v. Ortiz*, *supra*, 208 Cal.App.4th at p. 1379; *People v. Rosas* (2010) 191 Cal.App.4th 107, 111.)

4. *The Five-year Prior Serious Felony Enhancement*

The trial court also imposed a five-year sentence enhancement under section 667, subdivision (a)(1), based on a prior serious felony conviction. Jetson argues the trial court violated state law and due process by imposing the five-year enhancement without obtaining a knowing and voluntary admission of the prior serious felony conviction for purposes of applying section 667, subdivision (a)(1). Because Jetson's argument has merit, we vacate his sentence and remand for a limited trial on the prior serious felony allegation and for resentencing.

a. *Relevant Proceedings*

Before trial Jetson pleaded no contest to count 2 and admitted certain prior felony conviction allegations. The People alleged in count 2 that Jetson possessed a firearm as a felon and that Jetson's 2011 felony conviction (the predicate felony) made it illegal for Jetson to possess a firearm. The People also alleged in connection with counts 1 and 2 that Jetson's 1996 conviction for assault with a firearm was a prior serious or violent felony conviction within the meaning of the three strikes law and a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). The People alleged the 2011 drug conviction, the 1996 assault conviction, and two other drug convictions from 1999 and 2006 as the bases for prior prison term enhancements for purposes of section 667.5, subdivision (b).

The discussion at the March 6, 2018 hearing leading up to Jetson's no contest plea on count 2 referred to the overlap between Jetson's predicate 2011 felony conviction and the alleged prior prison terms for purposes of section 667.5, subdivision (b). The prosecutor stated, "[I]f he pleads to count 2 and admits the alleged prior, . . . he would then be alleging [*sic*] that prior for all purposes, which would include at the time of sentencing as well." The court said, "I think that's correct . . . [w]hen he's sentenced on count 2," and the prosecutor responded, "But I'm saying for purposes of count 1. If he's convicted of count 1. We've alleged prison priors, Your Honor, in the information, and one of the prison priors is the same as count 2." The court replied, "It would seem logical that if he admits it now, he can't take it back. An admission is an admission. Unless there is a legal reason to allow him to withdraw the admission." Neither the court nor the prosecutor referred to any overlap between the predicate for

count 2 (the 2011 felony conviction), the prior prison term allegations, and the alleged prior serious felony for purposes of the sentence enhancement under section 667, subdivision (a)(1).

The prosecutor proceeded to "take the plea" from Jetson and read Jetson the charge alleged in count 2: "You are charged . . . in count 2 with possessing a firearm while being convicted of a felony. The alleged felony prior resulted in a conviction [in] 2011 . . . . It's also alleged on this count that you suffered a strike conviction . . . for a charge of Penal Code section 245(a)(2) in 1996. Please be advised that the maximum sentence you can be sentenced on this count with the strike prior is six years." The prosecutor asked Jetson if he understood the maximum term, the charge against him, and the "alleged priors," and Jetson said he did. The prosecutor advised Jetson of his constitutional rights to a jury or court trial, to confront and cross-examine witnesses, to subpoena witnesses, and to remain silent "[o]n count 2 and the priors." Stating he understood these rights, Jetson pleaded no contest to count 2, admitted the allegation he suffered the count 2 predicate 2011 felony drug conviction, and admitted the allegation he was convicted in 1996 of assault with a firearm for purposes of the three strike law. The court accepted the plea and found that Jetson had expressly, knowingly, intelligently, and understandingly waived his constitutional and statutory rights.

On March 28, 2018, after the jury returned a guilty verdict on the lesser included offense of voluntary manslaughter on count 1, the court dismissed the jury and stated, "I had a sidebar question to confirm this,[9] so that the record is clear, that the

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9 The transcript does not indicate who participated in the sidebar conference or any details of its contents.

defendant pled no contest . . . to count 2 of the information, which is possession of a firearm by a felon. He also admitted [the predicate felony]. . . . And that is the prior that's alleged in count 2. He also admitted a prior [serious or violent felony conviction] pursuant to [the three strikes law]." The court stated that the prior serious or violent felony conviction was the 1996 conviction for assault with a deadly weapon under section 245, subdivision (a)(2), and that Jetson "also admitted that [the 1996 conviction] was also a five-year prior."

Prior to sentencing the People submitted a sentencing memorandum stating, "Before the jury trial, the defendant pleaded no contest to possessing a firearm as a felon . . . and admitted that he suffered a serious felony conviction." The People calculated Jetson's maximum sentence to include the five-year enhancement under section 667, subdivision (a)(1). Jetson, in addition to filing a motion under *Romero* to dismiss the prior serious or violent felony conviction for purposes of the three strikes law, asked the trial court to suspend the alleged "5-year prior enhancement," stating that Jetson "admitted a [section 667, subdivision (a)(1)] 'five-year prior.'"

On June 28, 2018 the court sentenced Jetson. There was confusion at the hearing about what Jetson admitted in connection with his plea on count 2, in part because the trial court's initial minute order did not indicate Jetson admitted a prior serious felony for purposes of the three strikes law or for any other purpose:

"[Counsel for Jetson]: I knew he pled to [count 2], but I was not sure if on the record he admitted the strike prior. . . .

"The Court: Are you still not sure? I would like a verification on the record. I trust the clerk. I think we need for appellate reasons –

"The Clerk: I did a nunc pro tunc based on information I received from the court reporter.

"[The Prosecutor]: I am satisfied because I reviewed the record with the reporter that [Jetson] in fact did admit the strike for all purposes prior to the introduction of evidence, Your Honor.

"The Court: Did he admit the one-year prior?

"[The Prosecutor]: Both.

"[Counsel for Jetson]: Can we have that read back?

"The Court: Well, not at this time. Let me check the minute order."

The minute order from March 6, 2018, as amended nunc pro tunc, reflected that Jetson admitted the prior predicate conviction alleged in connection with count 2 and the prior serious or violent felony conviction for purposes of the three strikes law. The amended order did not specify that Jetson admitted a prior serious felony for purposes of section 667, subdivision (a)(1), or prior prison terms for purposes of section 667.5, subdivision (b).

The court stated: "Returning to the status enhancements. The court imposes five years pursuant to 667(a), and that's as to [the 1996 conviction for assault with a firearm]. And the court imposes one year pursuant to 667.5(b) as to [the 2011 conviction for possession of drugs for distribution], for a total of six years."

b. *Applicable Law*

The Supreme Court in *People v. Cross* (2015) 61 Cal.4th 164 (*Cross*) explained the protections afforded criminal

defendants who admit the truth of a prior conviction allegation that subjects him or her to increased punishment: "When a criminal defendant enters a guilty plea, the trial court is required to ensure that the plea is knowing and voluntary. [Citation.] As a prophylactic measure, the court must inform the defendant of three constitutional rights—the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers—and solicit a personal waiver of each. [Citations.] Proper advisement and waiver of these rights, conducted with 'the utmost solicitude of which courts are capable,' are necessary 'to make sure [the accused] has a full understanding of what the plea connotes and of its consequence.'" (*Id.* at p. 170.)

The Supreme Court in *Cross* further stated: "In [*In re Yurko* (1974) 10 Cal.3d 857], we unanimously held that the same requirements of advisement and waiver apply when a defendant admits the truth of a prior conviction allegation that subjects him to increased punishment. The defendant in *Yurko* admitted, without adequate advisement or waiver, the truth of three prior felony convictions, resulting in an enhanced sentence of life imprisonment for his current first degree burglary offense. [Citation.] We explained: 'Because of the significant rights at stake in obtaining an admission of the truth of alleged prior convictions, which rights are often of the same magnitude as in the case of a plea of guilty, courts must exercise a comparable solicitude in extracting an admission of the truth of alleged prior convictions. . . . As an accused is entitled to a trial on the factual issues raised by a denial of the allegation of prior convictions, an admission of the truth of the allegation necessitates a waiver of the same constitutional rights as in the case of a plea of guilty.

The lack of advice of the waivers so to be made, insofar as the record fails to demonstrate otherwise, compels a determination that the waiver was not knowingly and intelligently made.' [Citation.] We concluded that '*Boykin* and *Tahl*[10] require, before a court accepts an accused's admission that he has suffered prior felony convictions, express and specific admonitions as to the constitutional rights waived by an admission. The accused must be told that an admission of the truth of an allegation of prior convictions waives, as to the finding that he has indeed suffered such convictions, the same constitutional rights waived as to a finding of guilt in case of a guilty plea.'" (*Cross*, *supra*, 61 Cal.4th at p. 170.) "We went on to say that a defendant must also be advised of 'the full penal effect of a finding of the truth of an allegation of prior convictions.' [Citation.] We held 'as a judicially declared rule of criminal procedure' that an accused, before admitting a prior conviction allegation, must be advised of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of being adjudged a habitual criminal." (*Id.* at pp. 170-171.)

Nevertheless, "'[t]he failure to properly advise a defendant of his or her trial rights is not reversible "if the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances."'" (*People v. Farwell* (2018) 5 Cal.5th 295, 302; see *Cross*, *supra*, 61 Cal.4th at p. 179.) "'[I]n applying the totality of the circumstances test, a reviewing court must "review[ ] the whole record, instead of just the record of the plea colloquy."'" (*Farwell*, at p. 302; see *Cross*, at pp. 179-180.)

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10 *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709]; *In re Tahl* (1969) 1 Cal.3d 122.

c. *Jetson Did Not Knowingly and Voluntarily Admit He Had Committed a Prior Serious Felony for Purposes of Section 667, Subdivision (a)*

As a preliminary matter, the People argue Jetson forfeited his challenge to the five-year enhancement under section 667, subdivision (a)(1), by failing to object to his sentence in the trial court. Whether he forfeited this argument turns on whether Jetson presents a question of constitutional or state law. The Supreme Court in *Cross* held that a defendant cannot forfeit the argument that the trial court should have ensured a plea or stipulation was voluntary and knowing by advising the defendant of his or her constitutional "right to 'a fair determination of the truth of the prior [conviction] allegation.'" (*Cross*, *supra*, 61 Cal.4th at p. 173.) The right to be informed of the penal consequences of admitting a prior conviction, however, is considered "'a judicially declared rule of criminal procedure.'"[11] (See *id.* at p. 170; *People v. Villalobos* (2012) 54 Cal.4th 177, 182; *People v. Jones* (2009) 178 Cal.App.4th 853, 858; *People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771.) "[B]ecause 'advisement as to the consequences of a plea is not constitutionally mandated,' 'the error is waived absent a timely objection.'" (*Villalobos*, at p. 182; *Jones*, at p. 858.)

If Jetson can argue the trial court's failure to apprise him that his admission of a prior serious or violent felony for purposes

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11 Both *Cross* and *In re Yurko* suggested the federal or state constitution may require trial courts to advise criminal defendants of the full penal effects of a guilty plea. (See *Cross*, *supra*, 61 Cal.4th at p. 179; *In re Yurko, supra,* 10 Cal.3d at p. 864 & fn. 7.)

of the three strikes law also admitted the prior conviction for purposes of section 667, subdivision (a)(1), violated his constitutional rights under *Cross*, then he did not forfeit that argument by failing to object to his sentence. Cases decided before *Cross*, however, generally held that a defendant's admission of a prior conviction was not limited to the fact of the conviction but included all allegations concerning the felonies contained in the information. (See, e.g., *People v. Ebner* (1966) 64 Cal.2d 297, 303-304.) Because a true finding under section 667, subdivision (a)(1), requires only a determination that the defendant suffered a prior conviction for a serious felony, it is unclear whether a trial court violates a defendant's constitutional rights when it fails to mention section 667, subdivision (a)(1), before the defendant admits a prior conviction for another purpose or whether the court merely violates a judicially-declared rule of criminal procedure, and we have not identified any reported decision addressing this issue.

In cases holding a trial court committed only state law procedural error by imposing a sentence enhancement without advising the defendant of the full penal effects of his admission, the trial courts have at least advised the defendant of the statute providing for enhanced punishment, or the defendant admitted a prior conviction as "alleged" in the information. (See, e.g., *People v. Carrasco* (2012) 209 Cal.App.4th 715, 724 [trial court could use the defendant's admission of prior convictions to impose prior prison term enhancements where the trial court referred to the information during a court trial on the prior convictions, noted they were "'state prison priors pursuant to 667.5, subdivision (b),'" and told the defendant he could serve an additional one year for each of the two state prison priors before the defendant

admitted the prior convictions]; *People v. Jones*, *supra*, 178 Cal.App.4th at p. 859, fn. 3 [defendant admitted the truth of a prior arson conviction "'as further alleged in Count 1,'" which included allegations under the three strikes law, section 667, subdivision (a)(1), and section 451.1].) Neither of those circumstances, however, exists here. Thus, the trial court arguably violated Jetson's constitutional rights by failing to advise him, directly or indirectly, that his admission of a prior serious or violent felony conviction for purposes of the three strikes law included an admission of a prior serious felony conviction for purposes of section 667, subdivision (a)(1). (See *Cross*, *supra*, 61 Cal.4th at p. 180 [reversing a sentence based on a prior conviction allegation where "the record contain[ed] no indication that [the defendant's] stipulation [to the prior conviction] was knowing and voluntary"]; see also *People v. Lopez* (1985) 163 Cal.App.3d 946, 950 ["an admission that a defendant has suffered a prior 'serious felony' conviction of burglary cannot establish that the conviction was for residential burglary unless the record reflects both that the defendant was told that a prior 'serious felony' conviction of burglary means a prior conviction for burglary of a residence and that he was warned of the consequences of such admission"].)

We need not decide whether the trial court violated Jetson's constitutional rights or state law, however, because even if Jetson alleged only state law error and may have forfeited that argument by failing to object to his sentence in the trial court, we exercise our discretion to consider Jetson's argument. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7 [courts may exercise discretion to consider an arguably forfeited argument on the merits where the application of the forfeiture rule is unclear]; see

also *People v. McCullough* (2013) 56 Cal.4th 589, 593 ["neither forfeiture nor application of the forfeiture rule is automatic," and "[c]ompeting concerns may cause an appellate court to conclude that an objection has not been forfeited"]; *People v. Young* (2017) 17 Cal.App.5th 451, 463 ["the fact that a party may forfeit a right to present a claim of error to the appellate court if he or she did not raise the issue in the trial court does not mean the appellate court is deprived of authority to reach the merits of the issue"].) It was the trial court's duty to ensure Jetson's plea was knowing and voluntary (*Cross*, *supra*, 61 Cal.4th at p. 170), and the record indicates neither the trial court nor the parties grasped the scope of Jetson's admission when he pleaded no contest to count 2. (See *People v. French* (2008) 43 Cal.4th 36, 49 ["The record does not contain any suggestion that either party understood that defendant, by pleading no contest, thereby admitted any factual issue relevant to imposition of sentence."].) At sentencing, counsel for Jetson asked the trial court to read back the transcript from Jetson's plea to clarify the record, but the trial court declined. (Cf. *People v. Scott* (1994) 9 Cal.4th 331, 353 [applying forfeiture in part on the ability of defense counsel to "call[ ] to the court's attention" errors and defects that are easily prevented and corrected].) Under these circumstances, we exercise our discretion to reach the merits of Jetson's argument.

Before Jetson pleaded no contest to count 2, the court and the prosecutor failed to inform him that, if Jetson admitted the prior serious or violent felony conviction allegation for purposes of the three strikes law, the court could sentence him to an additional five years in prison for having a prior serious felony under section 667, subdivision (a)(1). In fact, neither the court, the prosecutor, nor the court's amended March 6, 2018 minute

order ever mentioned or even alluded to section 667, subdivision (a)(1). This omission arguably violated Jetson's constitutional rights, and at a minimum failed to comply with a judicially declared rule of criminal procedure. (See *Cross*, *supra*, 61 Cal.4th at p. 170.)

The People argue the totality of circumstances suggests Jetson's admission of his prior serious or violent felony conviction was knowing and voluntary for purposes of imposing the five-year enhancement under section 667, subdivision (a)(1), because the prosecutor and the court informed Jetson that, by admitting a prior conviction for purposes of his no contest plea, "he was admitting the conviction for sentencing purposes." But the discussion preceding Jetson's plea to count 2 concerned the use of the predicate felony conviction for the crime of possession of a firearm as a felon—the 2011 drug conviction—for purposes of the one-year prior prison term enhancement, not the use of the 1996 prior felony conviction for purposes of the five-year enhancement under section 667, subdivision (a)(1).

The People also argue Jetson effectively admitted the prior serious felony conviction allegation by requesting, in his motion under *Romero*, that the court suspend the corresponding five-year enhancement. On review, we may consider events following the entry of a plea or admission to confirm its "character and scope." (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 167, fn. 2; see *People v. Wrice*, *supra*, 38 Cal.App.4th at pp. 770-771 [considering the defendant's argument for leniency and a prosecutor's letter identifying the prior prison term enhancement in determining whether defendant's admission of prior convictions was a knowing and voluntary admission of the prior prison term].) In addition, a defendant's failure "to express any surprise or

confusion" regarding his sentence is relevant in ascertaining the nature and extent of a waiver or admission. (See *Sivongxxay*, at p. 167, fn. 2.)

That Jetson's motion under *Romero* to strike his serious or violent felony conviction for purposes of the three strikes law included a request to suspend the five-year sentence enhancement under section 667, subdivision (a)(1), suggests Jetson eventually understood all the penal consequences of his plea on count 2. At the sentencing hearing, however, the parties and the court continued to express some confusion over the scope and consequences of Jetson's plea to count 2, and counsel for Jetson sought unsuccessfully to clarify that confusion. While the record suggests counsel for Jetson knew at the time of the sentencing hearing that the trial court might impose the five-year enhancement under section 667, subdivision (a)(1), the People have not shown Jetson had that understanding at the time he entered his plea to count 2. (See *People v. Farwell*, *supra*, 5 Cal.5th at p. 306 ["[t]here is no affirmative showing that [the defendant] understood he was waiving his trial rights by virtue of the stipulation entered on his behalf," italics omitted].) The People also suggest we can affirm imposition of the five-year enhancement because "substantial evidence supports the court's true finding on the allegation." The question, however, is not whether the trial court properly imposed the sentence enhancement after the jury or court found true the allegation that Jetson suffered a prior serious felony under section 667, subdivision (a)(1). (See *People v. Livingston* (2012) 53 Cal.4th 1145, 1170 [substantial evidence standard applies to determine the sufficiency of the evidence to support a sentence enhancement].) The issue is whether Jetson's admission of this

allegation was knowing and voluntary. On balance, and in light of the obvious confusion in the record, we conclude it was not. (See *Farwell*, at p. 307 [where "the circumstances preceding the stipulation [we]re cryptic at best" the court will not infer the defendant understood the full legal effect of his stipulation].)

The People take the position that, "[s]hould this Court find any error with regard to the [trial] court's true findings on the [prior felony conviction] allegations, the remedy is a limited remand for a trial on [the] enhancement allegations." We have found one such error, regarding the prior serious felony conviction allegation under section 667, subdivision (a)(1). We adopt the People's proposed remedy, vacate Jetson's sentence, and remand for a new adjudication of the prior serious felony conviction allegation under section 667, subdivision (a)(1), and for resentencing. (See *Cross*, *supra*, 61 Cal.4th at p. 180 [where "nothing in the record affirmatively shows [the defendant] was aware of his right to a fair determination of the truth of the prior conviction allegation," his stipulation to a prior conviction "must be set aside"].) If the trier of fact finds the allegation true, or Jetson admits it, the trial court must exercise its discretion under section 667, subdivision (a)(1), as amended, whether to impose the five-year enhancement. (See *People v. Bell* (2020) 47 Cal.App.5th 153, 200; *People v. Jones* (2019) 32 Cal.App.5th 267, 272; Stats. 2018, ch. 1013, §§ 1, 2.)[12]

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[12] Because we vacate Jetson's sentence and remand for resentencing, Jetson's argument his sentence constituted cruel and unusual punishment is moot. In addition, as the People suggest, Jetson will also have the opportunity on remand to request a hearing and present evidence demonstrating his

F. *The Trial Court Did Not Err in Denying Jetson's Petition for Juror Information*

1. *Relevant Proceedings*

The jury returned its verdict on March 28, 2018, and the court polled the jury. Before releasing the jurors the court informed them that the lawyers in the case could speak with them about the verdict and their deliberations, as long as the conversations occurred with the jurors' consent and at a reasonable time and place. The court sealed the jurors' personal identifying information and asked the jurors to stay another five or 10 minutes in the jury room to allow the court to thank them for their service and counsel for Jetson to ask them questions (the prosecutor was not present). The court reminded the jurors that their willingness to speak with counsel for Jetson was "voluntary."

The record does not reveal whether counsel for Jetson spoke with any jurors in the jury room, but counsel for Jetson later said two jurors approached her outside the courthouse that day. Juror No. 2 told her she thought another juror was biased against Jetson because of his race, and Juror No. 12 said he based his "final decision on his Christian faith and the fact God said, 'thou shall not kill,' although he believed Mr. Jetson to be innocent." Both jurors told counsel for Jetson "some of the jurors hollered and for four days pressured them to change their verdict from not guilty to guilty."

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inability to pay the court assessments and fines imposed by the court. (See *People v. Belloso* (2019) 42 Cal.App.5th 647, 650, review granted Mar. 11, 2020, S259755; *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1172-1173.)

The court originally set sentencing for June 6, 2018, but granted Jetson's request to continue the sentencing hearing to June 20, 2018. The record does not reveal the reason for the continuance. On June 20, 2018 Jetson filed his petition for disclosure of juror information. The declaration of counsel for Jetson accompanying the petition stated "it is necessary that I communicate with jurors for the purpose of developing a motion for new trial." Also on June 20 the court again continued the sentencing hearing until the next day because Jetson was unavailable. Jetson remained unavailable for the next two court dates, and the sentencing hearing eventually proceeded on June 28, 2018.

Before sentencing Jetson the court considered and denied his petition for juror information. The court found counsel for Jetson failed to diligently pursue communications with the jurors when she had the opportunity. For example, the court found, during counsel's conversation with Juror Nos. 2 and 12 outside the courthouse, she did not ask follow up questions (such as what caused Juror No. 2 to believe one of the other jurors was racially biased) and failed to ask the jurors for their contact information after they informed defense counsel they would be willing to talk to her or her investigator. Counsel for Jetson said she believed that, once the court sealed the jurors' personal information, she could not contact jurors without the court's permission, even though the court informed the jurors in open court they could voluntarily speak with lawyers or representatives for the parties. The court also stated that sentencing already had been significantly delayed and that counsel for Jetson's declaration with respect to Juror No. 2 was speculative because it failed to

explain why Juror No. 2 believed another juror was racially biased.

2. *Jetson's Petition for Disclosure of Juror Information Was Untimely*

"Code of Civil Procedure section 237[, subdivision (a)(2)], requires, in a criminal case, that personal juror identifying information of trial jurors be sealed after the verdict is recorded." (*People v. Diaz* (2015) 235 Cal.App.4th 1239, 1243; accord *People v. Munoz* (2019) 31 Cal.App.5th 143, 165.) "Code of Civil Procedure section 206 codifies the prerogative of jurors to discuss the case after trial as well as their right not to talk with the parties." (*People v. Tuggles*, *supra*, 179 Cal.App.4th at pp. 380-381.) Consistent with the trial court's instruction to the jury in this case, Code of Civil Procedure section 206, subdivision (b), provides: "Following the discharge of the jury in a criminal case, the defendant, or his or her attorney or representative, or the prosecutor, or his or her representative, may discuss the jury deliberation or verdict with a member of the jury, provided that the juror consents to the discussion and that the discussion takes place at a reasonable time and place." Code of Civil Procedure section 206, subdivision (g), authorizes a defendant or his or her counsel to petition the court under Code of Civil Procedure section 237 "for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." Any such petition must be "supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." (Code Civ. Proc., § 237, subd. (b).)

"Code of Civil Procedure sections 206 and 237 do not contain an express timeliness requirement." (*People v. Johnson* (2013) 222 Cal.App.4th 486, 497-498.) "[T]hey have been construed as having an implied timeliness requirement, albeit only a limited one." (*Johnson*, at p. 498; see *People v. Diaz*, *supra*, 235 Cal.App.4th at p. 1243.) This limited requirement is based on the time a defendant has to develop a new trial motion or to use the information sought for another "lawful purpose." (See *People v. Duran* (1996) 50 Cal.App.4th 103, 122 ["we must consider the request [under Code Civ. Proc., § 237] in light of any time limitations associated with the purpose for which the information is sought"].) For example, in *Duran* the defendant filed a motion for new trial based on juror misconduct. The motion included a declaration from a defense investigator stating that a juror told him six weeks after the trial ended, but before sentencing, that she had dated the cousin of the victim in another murder case near the time of her jury service. (*Duran*, at pp. 108-109.) Three weeks later, on the date set for sentencing, the court held a hearing on the new trial motion, and counsel for the defendant orally requested the names and addresses of the other jurors. (*Id.* at pp. 109-110.) The trial court denied the request as untimely, and the court in *Duran* affirmed. (*Id.* at p. 110.) The court held: "[I]f the defendant or the defendant's counsel is precluded from using [juror] information for [an] expressed purpose due to time constraints, his or her request cannot be said to have been made for a lawful purpose." (*Id.* at p. 122.) In *Duran* the time had run on the defendant's opportunity to file or supplement a motion for new trial under section 1182, and any continuance would have required a showing of good cause, including due diligence, under section

1050.[13] The defendant in *Duran* could not satisfy the diligence requirement for a continuance because he failed to petition the court for juror information when he first learned of potential juror misconduct. (*Id.* at p. 110.) The court concluded: "Since appellant failed to show he exercised due diligence in pursuing this claim [of juror misconduct], there was no basis shown for continuing the hearing on the motion for new trial. Since appellant sought [juror] information to support his motion for new trial, there was no longer a lawful purpose to be served by releasing this information. The trial court thus acted properly in denying the untimely request for juror information." (*Id.* at p. 123; see *People v. Diaz*, *supra*, 235 Cal.App.4th at p. 1243; *People v. Johnson*, *supra*, 222 Cal.App.4th at p. 498.)

As stated, section 1182 requires a defendant to file a motion for new trial "before judgment." "In a criminal case, judgment is rendered when the trial court orally pronounces sentence." (*People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9; see *People v. John* (2019) 36 Cal.App.5th 168, 174.) Jetson filed his petition for juror information on June 20, 2018, the same day as the continued sentencing hearing. To file a timely motion for new trial before judgment, Jetson would have needed the court to

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[13] Section 1182 provides that an "application for a new trial must be made and determined before judgment . . . ." Section 1050, subdivision (e), requires a defendant to make a showing of good cause for a continuance, including a showing the defendant and his or her counsel have prepared for trial diligently. (*People v. Reed*, *supra*, 4 Cal.5th at p. 1004.)

continue the sentencing hearing.[14] Like the defense attorney in *Duran*, however, counsel for Jetson failed to act diligently in seeking such a continuance by failing to pursue contact information for Juror Nos. 2 and 12 after learning of possible juror misconduct. Indeed, counsel for Jetson waited almost three months after the jury returned its verdict and she spoke with the two jurors before filing the petition for juror information. Thus, Jetson did not have good cause to continue the sentencing hearing, could not have filed a timely motion for new trial, and did not have a lawful purpose for requesting juror information. Therefore, his petition for that information was also untimely. Even if counsel for Jetson believed she could not communicate with jurors without the court's prior approval, she failed to seek that approval with diligence.

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[14] The court in fact did continue the sentencing hearing several times over the course of the week after Jetson filed his petition for juror information, but the court ordered those continuances because Jetson was not present in court, not because Jetson said he wanted to file a motion for new trial. Jetson never filed a motion for new trial.

DISPOSITION

The conviction is affirmed. The one-year prior prison term enhancement imposed under section 667.5, subdivision (b), and the five-year prior serious felony enhancement imposed under section 667, subdivision (a), are vacated. The matter is remanded with directions for the trial court (1) to hold a new trial on the allegation Jetson suffered a prior serious felony conviction within the meaning of section 667, subdivision (a), and, if found true, for the trial court to exercise its discretion pursuant to section 667, subdivision (a)(1), as amended, whether to impose the five-year enhancement; and (2) to allow Jetson to request a hearing and present evidence on his inability to pay the court facilities and court operations assessments, restitution fine, and parole revocation restitution fine.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.